STATE OF MICHIGAN

IN THE SUPREME COURT

POLICE OFFICERS ASSOCIATION OF MICHIGAN,

Plaintiff/Appellee,

v

OTTAWA COUNTY SHERIFF GARY A. ROSEMA, THE COUNTY OF OTTAWA, and OTTAWA COUNTY BOARD OF COMMISSIONERS

Defendants/Appellants.

SC No.127503

Court of Appeals: 244919

Lower Court No: 02-42460-CZ

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DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

January 13, 2006

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STATEMENT OF FACTS AND PROCEEDINGS

Plaintiff/Appellee, Police Officers Association of Michigan ("Association"), was certified by the Michigan Employment Relations Commission on November 22, 1989 to represent a unit of non-supervisory employees in the Ottawa County Sheriff's Department (collectively the Ottawa County co-employers are referred to as the "County"). The collective bargaining agreement between the parties expired on December 31, 1999. (Jt Ex. 1).[1]

The County and the Association met for collective bargaining sessions to negotiate a successor to the expiring collective bargaining agreement on October 26, 1999, November 22, 1999 and on December 14, 1999. At the October 26, 1999 bargaining session, parties discussed the Association's October 26, 1999 Proposal which included the following:

> **10. Modify grievance procedure to allow for Union Executive Board Member to sign as grievant in all violations of contract or policy but not to include discipline.**
> **11. Arbitrator's Powers defined to include authority to decide all matters including pension and insurance issues.**

At the November 22, 1999 bargaining session, the County presented its proposal of that contained a proposal to change the arbitration procedure regarding the payment of Arbitrator's fees.[2] At the December 14, 1999 bargaining session the Association submitted a revised proposal that provided:

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[1] The exhibits referred to are part of the record made by Act 312 Panel in the underlying Act 312 arbitration.
[2] The express language of the proposal was:

> 7) Grievance Procedure: Change existing section 19.3 to 19.3, (a) and remove "and the fees and expense of the arbitrator shall be borne equally between the parties hereto". Add new section 19.3, (b): "As part of the arbitrator's award, the arbitrator shall charge the total amount of the arbitrator's fees and expenses against the losing party, subject to the following guidelines: (1) In discharge or discipline cases the union will be deemed the losing party where the discharge or discipline is affirmed by the arbitrator or in any event the arbitrator modifies the discipline or discharge but does not award full back pay. (2) In contract formation grievances, the arbitrator will charge all of the arbitrator's fees and expenses against the employer if the grievance is granted in its entirety and against the union if the grievance is denied in its entirety. In the event that the arbitrator issues an award agreeing in part and disagreeing in part with the grievance, the arbitrator will prorate the arbitrator's costs and expenses between the parties so as to fairly reflect the

7. **Union Proposal on Filing Grievances: Status quo – Arbitrator's fees.**

No agreement was reached and the Association filed a request with MERC for Mediation on January 3, 2000, citing 12 issues in dispute including "4. Grievance Procedure." The grievance procedure issue raised by the Association in bargaining concerned (1) a proposed grievance procedure revision that would allow an Association executive board member to file contract interpretation grievances; and (2) a proposed revision to arbitrator's powers request to interpret the provisions of insurance programs and pension plans. No issue was raised regarding the duration of the agreement, since the County and the Association were in agreement that it would extend through December 31, 2002, nor was Retroactivity of Grievance Procedures to Hiatus Grievances raised.[3] A mediation session was held on February 11, 2000 with MERC Mediator Marge Paquet, but no agreement was reached.

The Association filed an Act 312 Petition on June 7, 2000 (Jt. Ex.4), which stated as follows:

> The Petitioner has engaged in good faith bargaining and mediation and the parties have not succeeded in resolving the disputed matters. The following is a list of any issues in dispute and the related facts thereto:
>
> 1. Wages – Road Patrol and Detective; 2.Wages – Specialist Pay; 3. Wages – Detective Premium; 4. Longevity; 5. Vacation Allotment; 6. Workers Compensation Supplement; 7. Retiree Health Insurance – Premiums; 8. Retiree Health Insurance – Spouse & Dependents; 9. Call-in Pay; 10. Overtime Calculation; 11. Seniority During Short- Term Disability; 12. Seniority – Inter-Unit Bumping; **13. Grievance Procedure; 14. Arbitrator's Powers**.

The County filed the following Answer to the Petition (Jt. Ex 5):

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winner and the loser in the grievance. The parties will each be responsible for their own costs of representation.

[3] In this context, "Hiatus Grievances" are grievances that occur during the gap period between contracts and "Retroactivity of Grievance Procedures" refers to whether the grievance procedure established either by subsequent agreement or by the 312 process should apply to Hiatus Grievances. "Prospectivity of Grievance Procedures" applies to the extension of the grievance procedures beyond the term of the collective bargaining agreement until a new agreement is reached.

"1. The County acknowledges that the parties have not, to date, reached an agreement on the issues itemized in the petition.

2. The parties have not reached an agreement on the following additional issues:
   A. Health Insurance – cafeteria plan and flexible spending account
   B. Prescription co-pay
   C. Costs of grievance arbitration
   D. Effective date of implementation of changes"

The Answer was filed to correct the failure of the Association to list the County's issues.[4]

MERC appointed Mr. Mark Glazer as the neutral Act 312 Arbitrator and in accordance with R 423.507 he scheduled a prehearing conference for September 19, 2000.[5] At the

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[4] Under Resolution 103 of the 1984 Procedures the Petition was required to include "a list of issues in dispute, identifying economic and non-economic issues." Resolution 104 then required an answer to be filed with "a summary of the issues in dispute." The new Rules deleted the requirement for an answer but placed an affirmative obligation upon the party filing the Petition to include "A copy of the last offer made by each party to settle the agreement."

[5] This rule provides:

Rule 7. (1) **An arbitrator shall conduct a prehearing conference within 15 days of the arbitrator's appointment**. It may be conducted by telephone conference call.

(2) The prehearing conference shall be used to discuss matters relating to the proceeding, including all of the following:

(a) Issues raised in the petition for binding arbitration submitted to the commission.

(b) Issues that the parties have resolved.

(c) Whether the issues in dispute are economic or noneconomic.

(d) The dates, times, and place of the hearing.

(e) The exhibits to be entered into evidence, the method to be used for marking the exhibits, the number of copies of the exhibits to be provided by the parties, and the time and means of exchanging exhibits before the hearing.

(f) The list of witnesses to be presented by each party.

(g) The list of comparables for purposes of wages and benefits.

(h) The procedural format for the hearing.

(i) Any subpoenas, stipulations, or depositions.

(j) Whether oral arguments or written brief are to be submitted.

(k) Other matters the panel considers appropriate.

Other rules relevant to the raising and disposing of issues include, R.423.509 regarding "Arbitrator; powers and duties:"

Rule 9... (2) In addition to the duties specified in act 312, the panel shall do all of the following: ...

(f) Hold conferences during the course of the hearing for the settlement, simplification, or **adjustment of the issues by mutual consent;**

and R. 423.513, regarding "Panel findings, opinion and award:"

Rule 13.... (3) The written decision and award of the panel shall contain all of the following information:...

(d) Each party's final offer of settlement of the issues in dispute.

September 19, 2000 prehearing conference, the Association dropped issues #13 and #14 concerning grievance procedures and the arbitrator's powers. It was further agreed by the parties at the conference that all of the remaining issues were economic, and this finding was included in the September 25, 2000 letter from Arbitrator Glazer summarizing the matters discussed in the September 19, 2000 prehearing conference (Jt. Ex. 6).[6]

A hearing was held to determine the comparable communities on January 18, 2001 and a hearing on the merits of the issues in disputes was scheduled for October 4, 2001. In the interim, the parties reached agreement on every bargained issue except the retroactivity of wages to retired and/or deceased deputies. No action was ever taken by the Association to amend the Act 312 Petition to add Retroactivity of Grievance Procedures as a new issue or to request the Arbitrator Glazer to amend the prehearing order to allow consideration of new issues.

At the October 4, 2001 hearing, for the first time in either the parties bargaining or in the 312 proceedings, the Association presented the following proposals:

ARTICLE XIX
GRIEVANCE PROCEDURE

PRESENT: No language currently exists.
PROPOSED: Add language to contract.

19.14: The right to arbitrate grievances shall be retroactively in effect as of January 1, 2000 for those grievances which have been filed and appealed to arbitration by the Union on or after January 1, 2000.[7]

ARTICLE XXVI
DURATION

PRESENT:
26.1:(ii) This Agreement shall be effective for employees in the classifications of Detective and Road Patrol Deputy August 5, 1998, and shall remain in full force

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(e) **A listing of the economic and non-economic issues in dispute as identified by the arbitration hearing panel.**

[6] The issues of Grievance Procedure and Arbitrator's Powers were not covered by this determination of economic status since they were no longer considered to be active issues.
[7] This is UX-3 to the Act 312 proceeding.

and effect until December 31, 1999, and shall become automatically renewable from year to year thereafter, unless either party wishes to terminate, modify or change this Agreement, in which event, notification of such must be given to the other party in writing sixty (60) days prior to the expiration date of this Agreement, or any anniversary date thereof.

PROPOSED:

26.1:(ii) This Agreement shall be effective for employees in the classifications of Detective and Road Patrol Deputy **January 1, 2000**, and shall remain in full force and effect until **December 31, 2002**, and shall become automatically renewable from year to year after **December 31, 2002**, unless either party wishes to terminate, modify or change this Agreement, in which event, notification of such must be given to the other party in writing sixty (60) days prior to **December 31, 2002**, or any anniversary date thereof. . **Upon transmittal of such notice, this Agreement shall remain in full force and effect after December 31, 2002 until the earlier of: execution of a successor agreement through negotiated settlement (or compulsory arbitration), or December 31, 2003; provided that continuation of this agreement shall not constitute a waiver or bar to any claim for retroactive application of wages and/or benefits in any successor agreement.**[8]

The County objected to the consideration of these issues for several reasons, including that the grievance issue was a non-economic issue that the panel had no jurisdiction to award retroactively, and that the issues were not timely raised since they were not contained in the initial Petition or during the prehearing conference.

Testimony was taken regarding the history of these proposals, and Mr. Spidell admitted that the Retroactivity of Grievance Procedures and Prospectivity of Grievance Procedures were not contained in the Act 312 Petition. He testified that the Association's concern over not being able to take matters to arbitration after the expiration of a contract was discussed during bargaining, but there was no evidence that the Association had ever made a formal proposal on that issue or that the issue had been subject to mediation.

In a January 3, 2002 decision, a 312 Arbitration Panel ("Panel") ruled that procedurally, the Association failed to raise in its petition or at the prehearing conference, Retroactivity of Grievance Procedures or Prospectivity of Grievance Procedures as issues for the Panel to decide.

In fact, the Panel held, based on the testimony of the Association representative, that the Association had withdrawn the only two issues that may have indirectly signaled an intention to raise Retroactivity of Grievance Procedures or Prospectivity of Grievance Procedures as issues; namely, "grievance procedures" and the "arbitrator's powers:"

> "Mr. Spidell testified that the arbitration issues presented in this matter were not specifically included in the Act 312 petition. He added that during a telephonic pre-hearing, the Association dropped its issues #13 [Grievance Procedure] and #14 [Arbitrator's Powers] concerning grievance procedures and the arbitrator's powers."

Panel Opinion, p. 5 [Bracketed information added].

> "...Neither the petition nor the answer which were submitted include an issue pertaining to [retroactivity of] arbitration rights or prospective application of arbitration rights.

Panel Opinion, p. 8 [Bracketed information added].

> "The question of retroactivity of arbitration rights and the prospective application of those rights was raised by the Association for the first time shortly before the October 2001 arbitration hearing in a September 25, 2001 letter and in a telephone conference in August of 2001. However, it was never made clear that the Association was intending to submit last best offers on these issues. More importantly, the Association never asked to amend the petition or the pre-hearing order to allow a consideration of the arbitration-related issues. Moreover, the Employer never agreed to allow these issues to be considered by the panel.[9]
>
> It only became apparent that the Association wanted last best offers on the arbitration-related issues at the 312 hearing. ...However, the Association's position was not expressed either in the petition or the pre-hearing conference, when issues were identified as required by the rules."

Panel Opinion, p. 9.

The Panel refused to add Retroactivity of Grievance Procedures or Prospectivity of Grievance Procedures as issues to be decided, finding that to do so would be inconsistent with

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[8] This is UX-15 to the Act 312 proceeding.

[9] In fact, the Panel noted that the County Co-employers had objected to the timeliness of the Association's assertion of the Retroactivity of Grievance Procedures issue and that it was a non-economic issue that was not subject to potential retroactivity under Section 10 of Act 312. See Panel Opinion, p. 7.

the requirement in Act 312 and its implementing Rules that issues be raised in the petition and prehearing process so that neither part is "sandbagged" at the hearing. Panel Opinion, pp. 9-11.

> Because of the requirements of Act 312, and the commission rules as it relates to the identification of issues, it would be inappropriate to consider arbitration-related last best offers of the Association. Act 312 and the commission rules clearly require identification of issues well in advance of the hearing. When the Association waited until the time of the hearing to raise its arbitration-related issues, it violated the rules and the Act, and it would be improper to consider the last best offers at this time. (Opinion at 9-10).

No determination was made regarding the status of either of the rejected issues as economic or non-economic. The Association's representative, Mr. Guido filed a dissenting opinion to this Opinion and Award. [10]

On February 21, 2002, the Association filed a complaint seeking to vacate that portion of the arbitration award that refused to consider the Association's newly raised issues on Retroactivity and Prospectivity of Grievance Procedures to Hiatus Grievances. Ottawa Circuit Court Case No. 02-042460-CZ. Cross-Motions for summary disposition were filed and on September 23, 2002, the Ottawa Circuit Court issued an oral opinion granting summary disposition to the County and conclusively deferring to the Panel's decision on the issues in dispute. An Order incorporating the opinion was entered on October 17, 2002. The Association subsequently filed a timely Claim of Appeal with the Court of Appeals.

The Association filed its appellate brief with that Court on December 23, 2002.[11] This brief did **not** claim that the disputed issues were economic issues, nor that the Panel found these issues to be economic. On August 19, 2004, the Court of Appeals issued its initial Opinion in this matter, reversing the Circuit Court's decision and remanding for further proceedings. This decision was procedurally based upon the Court's belief that it had *de novo* review of the Circuit

[10] The Association substituted Mr. Guido for Mr. Spidell as its delegate at the hearing.
[11] The County filed its brief on January 30, 2003.

Court's affirmation of the Panel's decision[12] and then reversed based upon its interpretation that MCL §423.238 permits the parties to raise new issues all the way until the end of the 312 hearing:

> "[T]he arbitration panel erred in concluding that MCL 423.238 precluded consideration at the arbitration hearing of the Association's issue regarding the retroactive arbitration of grievances. Nothing in the plain language of MCL 423.238 precludes a party from identifying a disputed issue at the arbitration hearing. The arbitration panel erred by failing to consider Association's last best offer on the issue of retroactive arbitration of grievances, and the trial court erred by granting defendant's motion for summary disposition."

Footnote 3 of that opinion noted that "the panel implicitly concluded that the issue was economic," and that "[p]ursuant to MCL 423.238, the panel's determination on this issue was 'conclusive.'" After receipt of the August 19, 2004 Opinion, the County filed a motion to supplement the record and for reconsideration.

On October 14, 2004, the Court of Appeals granted the County's motion for reconsideration, vacated the August 19, 2004 Opinion and issued a new Opinion. That new Opinion contained a new footnote 3 which provided as follows:

> "MCL 423.238 only applies to economic issues. While appellant challenges both the panel's determination that the retroactivity question is arbitrable and that it is an economic issue, for purposes of this case these determinations are 'conclusive.' MCL 423.238."

The County timely filed an Application for Leave to Appeal on November 26, 2004.

On December 16, 2005, the Court issued an Order directing the scheduling of Oral Argument on this case and directing the parties to file supplemental briefs addressing:

> (1) whether the Act 312 arbitration panel identified the economic issues in dispute and properly rejected plaintiff's request to add new issues in accordance with the plain language of MCL 423.238, and (2) whether a reviewing court has authority to direct the arbitration panel to reconsider its determination of the "economic

[12] This decision failed to recognize that the Ottawa Circuit Court was acting as a reviewing entity of the underlying Act 312 proceeding rather than a court of first impression.

issues in dispute" in light of the conclusive authority granted to the arbitration panel in MCL 423.238.

This brief is filed in response to that Order.

LEGAL ARGUMENT

I. Under Act 312, the Arbitration Panel's identification of issues for its review is conclusive, whether the issue is economic or not.

On of the ironies in this case is that neither the Association nor the County Co-employers consider Retroactivity of Grievance Procedures[13] to be an economic issue, nor do they believe that the Panel found Retroactivity of Grievance Procedures to be economic issues. See the heading of the Association's Argument on page 14 of its Brief in Opposition to the Application. The issue of whether Retroactivity of Grievance Procedures is an economic issue is largely a red herring in this case, since the right of a 312 panel to determine issues conclusively, as noted below, applies to both economic and noneconomic issues.

MCL §423.238 in relevant part confers on the Arbitration Panel the exclusive right to determine the issues in dispute **and** then, once it determines whether an issue is in dispute, to subsequently determine whether the issue is "economic:"

> ...The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive.

The plain language of the statute is the clearest evidence of legislative intent, the primary goal of statutory interpretation.[14] The Panel's decision not to allow the Association to add Retroactivity of Grievance Procedures as an issue in dispute was a "determination of the arbitration panel as to the issues in dispute" under the plain meaning of the statute. As such, it

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[13] Prospectivity of Grievances is a moot issue since the parties have had subsequent collective bargaining agreements.

[14] See *Gladych v New Family Homes, Inc.*, 468 Mich 594, 597 (2003).

should have been given conclusiveness by the Court of Appeals (as it was by the Ottawa County Circuit Court) and, therefore, the appeal should have been dismissed.[15]

The Association may argue that the mere mention by the Panel in its Opinion of the fact that the Association tried to raise Retroactivity of Grievance Procedures as an issue was a "determination" that it was an issue in dispute. This can only be viewed as a contorted interpretation of the statute that reduces the role of the Panel to that of court reporter or scrivener by stripping the statutory word "determination" of all connotations of discretion, a result that is simply inconsistent with its common or plain meaning.

Websters Comprehensive Dictionary of the English Language (2004 Edition) defines the root word "determine" as meaning "to settle or decide as an argument, question or debate" or "to ascertain or fix, after thought or observation" or "to regulate, fix or decide causally" or "to limit, terminate: usually in legal usage." Inherent within each of these definitions is the application of discretion in the face of a dispute, which is exactly what the Panel did here in determining that Retroactivity of Grievance Procedures would not be permitted as an issue in dispute. Thus, the Association's position is inconsistent with the plain meaning of the words chosen by the legislature.

The Association's assumed view that the Panel's mere acknowledgement that the Association wanted an additional issue in dispute constitutes a "determination" that such an issue is in dispute would also lead to absurd results. Obviously, in this case, the Panel believed that the Association should not be allowed to add Retroactivity of Grievance Procedures as an issue at the 312 hearing, when it had not been raised in the petition or pre-hearing conference. Under the Association's presumed view, however, the only way that the Panel could make this

[15] Since the Panel decided that Retroactivity of Grievance Procedures was not an issue in dispute, it never reached the question of whether, as an issue in dispute, it was economic or not.

determination, was to ignore it. In other words, the only way for the Panel to decide the issues in dispute was to ignore any dispute about the issues in dispute. This is absurd.

The Court of Appeals' decision is also inconsistent with the plain meaning of another base word in the statute, "conclusive." *Webster's* defines "conclusive" as "decisive, putting an end to doubt." In the present context, this definition effectively recognizes that the only time conclusiveness is relevant is when there is a question or dispute about the issues in dispute. That is to say that the only time where the statutory maxim that the "Panel's determination of the issues in dispute is conclusive" would have any applicability is an instance where one of the parties complains to a court that an arbitration panel heard an issue or refused to hear an issue that a party raised or tried to raise at the hearing.[16]

The Court of Appeals' interpretation of this statute actually turns it on its head, shifting the determinative power over the issues in dispute from the 312 arbitration panel to the parties, since it essentially finds that any time a party wants to add an issue—all the way until the end of the arbitration hearing—an arbitration panel must allow it do so. This result is the opposite of conferring "conclusiveness" in determining the issues to the Panel, instead conferring conclusiveness to the parties' ability to raise issues until the closing of the hearing.

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[16] The conclusive nature of these decisions provides the finality essential for the Act 312 process to provide an expeditious resolution of disputes. There cannot be endless litigation regarding the issues that are before the panel. All a party needs to do to ensure that an issue is presented is to make a proposal on it during bargaining, continue to discuss that issue in mediation, attach a copy of its proposal showing that there is a dispute on that topic to its Act 312 Petition, and assert the continued existence of that dispute at the prehearing conference and at the hearing. Issues such as those attempted to be raised by the Association that did not go through the collective bargaining and mediation process are not ripe for resolution by the Act 312 process. Consideration by the Panel of an issue not properly before it would likely constitute an extension of its jurisdiction, subjecting itself to review under MCL §423.242. This constitutes another reason why the Court of Appeals decision is reversible error, since it is undisputed that there was no bargaining, no mediation, and no discussion of Retroactivity of Grievance Procedures through the pre-hearing process.

The Court of Appeals reached this incongruous result by interpreting the first sentence in MCL §423.238 as denying "conclusiveness" to the Panel's determination of economic issues in dispute. The first sentence provides that:

> At or before the conclusion of the hearing held pursuant to section 6, the arbitration panel shall identify the economic issues in dispute...

The proper interpretation of the first sentence in the statute is that ***this language has nothing to do with the raising of issues***. Instead, this language has the meaning ascribed by the Panel and Ottawa County Circuit Court; namely, that it ***obligates the Panel to "define" the economic issues properly raised by the parties at some point before the record is closed***, so that the parties know the issues on which the Panel would be accepting either one or the other's last best offer:

> "...The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make findings of fact and promulgate a written opinion and order upon the issues presented to it and upon the record made before it, and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the employment relations commission. As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in section 9. The findings, opinion and order as to all other issues shall be based upon the applicable factors prescribed in section 9. This section as amended shall be applicable only to arbitration proceedings initiated under section 3 on or after January 1, 1973."

MCL §423.238.

Simply stated, the question of whether an issue is "economic" has nothing to do with the procedural question of when issues can be raised, but rather pertains to the Legislature's denial of discretion to 312 arbitration panels to forge a middle ground on such issues and, as discussed *infra,* whether an issue can be the subject of retroactivity. To suggest that the designation of an issue as "economic" means that the arbitration panel loses its discretion in determining whether

the issue was properly placed in dispute is to deny the very structure of the relevant portion of Section 238, which provides that the Panel's determination of all issues in dispute ***"and"*** its subsequent decision as to which issues in dispute are economic are both to be conclusive.

As noted in the Application, the Court of Appeals' Opinion, therefore, leads to the incongruous result that parties in 312 arbitration ***cannot*** "sandbag" or "ambush" each other at the hearing on ***the noneconomic issues***, but they ***can sandbag or ambush*** each other at the hearing ***on the economic issues***. This is yet another absurd result to the Court of Appeals' in patent violation of this Court's interpretive rule that absurd results be avoided.[17]

A plain reading of MCL §423.238 that avoids absurd results can lead to only one conclusion; namely, that it was intended to ensure that the Courts be completely deferential to the Panel's decision not to hear Retroactivity of Grievance Procedures as an issue in this case, regardless of whether or not it is viewed as an economic issue.

II. The Act 312 Panel did not determine that "Retroactivity of Grievance Procedures" is an economic issue.

The record of the Act 312 proceeding provides absolute clarity to the fact that the Panel **never determined** that Retroactivity of Grievance Procedures was an economic or, for that matter, a non-economic issue. While it did decide that all issues raised in the petition, as preserved at the prehearing conference, were "economic," as noted above in the Statement of Facts, it also expressly held that Retroactivity of Grievance Procedures was not an issued raised either in the petition or at the prehearing conference:

> It only became apparent that the Association wanted last best offers on the arbitration-related issues **at the 312 hearing**. ...**However, the Association's position was not expressed either in the petition or the pre-hearing conference, when issues were identified as required by the rules**."

Panel Opinion, p. 9. (Emphasis Added).

[17] See *Ford Motor Company v Lumbermen's Mutual Casualty Company*, 413 Mich. 22 (1982).

Thus, it is clear that when the Panel found after the pre-hearing conference that all issues were economic, it was not considering Retroactivity of Grievance Procedures to be such an issue. The Court of Appeals' holding, therefore, that the Panel found "Retroactivity of Grievance Procedures" to be an economic issue is unsupported in the record.

III. A court may not remand an issue to a 312 arbitration panel for consideration, especially an issue that would expand the panel's jurisdiction, if the union's position was accepted.

The answer to the first question that this Court asked to be addressed largely answers the Court's second question. If an arbitration panel's determination of which issues are in dispute is conclusive, a remand to the panel to reconsider an issue that the panel decided not to consider is never a judicial option. This interpretation of MCL §423.238 harmonizes it with the standard of judicial review outlined in MCL §423.242. In order to bring conclusion to an already lengthy process, the Michigan Legislature intended that the judiciary give deference to virtually all rulings of 312 panels. In fact, even some legal errors—namely, those that do not extend the panel's jurisdiction or otherwise violate the standards in the judicial review statute, may **not** be subject to review:

> "Orders of the arbitration panel shall be reviewable by the circuit court for the county in which the dispute arose or in which a majority of the affected employees reside, but only for reasons that the arbitration panel was without or exceeded its jurisdiction; the order is unsupported by competent, material and substantial evidence on the whole record; or the order was procured by fraud, collusion or other similar and unlawful means. The pendency of such proceeding for review shall not automatically stay the order of the arbitration panel."

MCL §423.242.

This case underscores the wisdom in this limited review. There must be finality to this process. What the Court of Appeals is ordering here, could result in the eventual arbitration of

grievances that are over ***6 years old***.[18] That is not a result that should be possible under Act 312, which even the Court of Appeals recognized in its Opinion is designed to reach an expeditious result. For this reason, except where there is procurement by fraud or other illegal means, the courts' potential relief is limited to vacation of all or portions of the panel award, and would **not** include remand for further panel decision-making

In light of this very constricted standard of review, it is fair to say that virtually any procedural error is outside the scope of judicial review. Certainly, the alleged procedural error here; namely, the refusal of the Panel to hear an issue cannot be construed as an "expansion" of the panel's jurisdiction, and therefore the Panel's alleged error (even if it was one, which it isn't) is **not** subject to judicial remand. Indeed, it is telling that the Court of Appeals in the present case did not and could not express its finding of legal error under the grounds enumerated in MCL §423.242's standard of review and that it clearly erred when considering the Panel's decision to be subject to a *de novo* judicial standard of review.[19]

There is an additional legal problem with the Court of Appeals' remand. It directs the Panel to consider undertaking an expansion of its lawful jurisdiction in violation of Act 312 and,

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[18] This might create a conflict with Mich Const Art 6, Section 28.The Court should not avoid a determination that Act 312 is unconstitutional by ignoring the specific language created by the Legislature. The existence of an appropriate standard of review played heavily in the less than consensus decision in *Detroit v DPOA*, 408 Mich 410; 294 NW2d 68, 81 n.25 (1980), and the fact that the Legislature might not have provided for effective judicial review should cause the Court to reconsider that decision. In the 25 years since the constitutionality of Act 312 was addressed the application of Act 312 has shown that it is not expeditious, it has adversely impacted collective bargaining by giving employees disincentives to enter into voluntary settlements, the duty to bargain in good faith as a condition to proceeding to arbitration has been judicially eliminated, there is no consistency in the awards since the awards are not published and arbitrators are not required to follow prior awards, and MERC declines to enforce its own rules. The Court may should review Act 312 to determine if its actual operation has differed significantly from its intended operation such that it now operates as an unlawful delegation of municipal decision-making to politically unaccountable arbitrators.

[19] The Opinion of the Court of Appeals in this case directly conflicts with the Court of Appeals' decision in *City of Detroit v. Detroit Fire Fighters Association,* 204 Mich App 541, 551 (1994), which refused to apply a *de novo* standard of review to a circuit court's upholding of a 312 panel decision, and instead noted that the any judicial appeal must be tightly constrained to the standards in MCL §423.242. *City of Detroit* is directly based on this Court's express ruling on the subject in *Detroit v. Detroit Police Officers Ass'n,* 408 Mich. 410, 480 (1980). In

thus, the Court of Appeals' decision actually invites relief under MCL §423.242, which is to say that if the Panel in this case actually confers retroactivity to the parties' agreed grievance procedure to the 12 Hiatus Grievances, as it has been ordered to consider, it will clearly exceed its jurisdiction because a 312 panel clearly lacks the jurisdiction to make a grievance and arbitration procedure retroactive or prospective.

The holding in *Metropolitan Council 23 and Local 1917, AFSCME v Board of Com'rs of Wayne County*, 86 Mich App 453, (1979) leaves all 312 arbitration panels ***without the jurisdiction*** to issue an award on the very Retroactivity of Grievance Procedures issue that the Association asked the Panel to issue an award upon. As a result, not only are the courts without the jurisdiction to review the Panel's procedural finding that the request was untimely, but if the remand results in an award to the Association, the courts would be required to reverse under the very review statute that they would be using to order a remand.

Simply stated, MCL §423.240 precludes the Association's requested relief, because it limits retroactivity to "economic" issues, as distinguished from noneconomic issues:

> Increases in rates of compensation or other benefits may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provisions to the contrary notwithstanding.

This statute has been interpreted to confer upon a Panel the authority to award wages and economic benefits retroactively, but **not** the authority to order the retroactive application of noneconomic mandatory subjects of bargaining, such as the grievance procedure, **which even the Association acknowledges in its Brief in Opposition to the Application is a "noneconomic" issue. See the heading of its Argument on page 14 of its brief**. Indeed,

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contrast, the Court of Appeals in the present case actually went so far as to expressly declare that it was applying a *de novo* standard of review (Opinion, p. 2).

Michigan courts have expressly held that section 10's "broad powers do **not** include the power to grant retroactivity to noneconomic benefits," reasoning as follows:

> The Michigan Legislature clearly states that "increases (in rates of compensation) may be retroactive", but only back to the commencement of the fiscal year, I. e., December 1, 1974. The Legislature specifically speaks of retroactivity but only in regards to economic benefits. The Legislature was conspicuously silent on retroactivity of noneconomic benefits. We hold that had the Legislature intended for arbitration panels acting under the 1969 Act to have the power to grant retroactivity to the subject noneconomic provisions, they would have so provided. This Court is constrained to hold that the intent of the Michigan Legislature was not to grant such retroactivity.

Metropolitan Council No. 23, supra, 86 Mich App at 462-3 .

The Association argues that *Metropolitan Council No.* 23 is no longer valid law because the portion of Section 10 of Act 312 interpreted in that case was subsequently amended by 1977 PA 303 to read as follows:

> Increases in rates of compensation or other benefits may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provisions to the contrary notwithstanding.

In order to reach this conclusion, the addition of the phrase "or other benefits" as a modifier to "increases in rates of compensation" would have to be intended by the Legislature to mean "changes in economic and non-economic terms of employment." There is however no legislative history to support such a claim.

The provisions of 1977 PA 303 began as House Bill 4752. The First Analysis of this Bill prepared by the House Legislative Analysis Section indicated that the problem sought to be addressed by the Bill was that Act 312 currently provides:

> "that an increase in compensation awarded by an arbitration panel may only take effect at the beginning of the next fiscal year following the award unless a new fiscal year has begun since the start of the arbitration proceedings in which the award may be retroactive to the start of that fiscal year. This provision has resulted in the practice of employee groups automatically filing for arbitration prior to the end of the fiscal year to ensure that benefits would be retroactive, even though contract negotiations may have been proceeding smoothly."

One of the arguments against the adoption of the amendment was that "...if increased benefits are awarded retroactively, the municipality cannot raise taxes to cover this additional cost but must cut back services in other areas." This dialogue evidences an understanding that all benefits to which the amendment would apply would be economic. In fact, a review of the complete Analysis reveals no mention of non-economic issues, and reveals that the entire change concerned economic issues.

The Department of Labor Analysis of this Bill completed on June 23, 1977 indicated that:

> 7. What are the arguments for the bill?
>
> (1) The bill provides in clear terms that grievances cannot be arbitrated under Act 312. This will bring the law into conformance with court cases, which have upheld Michigan Employment Relations Commission's refusal to order an arbitration panel for grievance disputes. (See ***Grosse Pointe Farms Police Officer Assoc v Michigan Relations Employment Relations Commsn***, 52 Mich App 173 (1974).
>
> (2) The bill would broaden the procedures, which govern the retroactively given increases in rates of compensation, and include benefits as well as compensation rates in retroactive awards. The present statute provides that compensation increases may be effective only at the start of the next fiscal year, except for a new fiscal year as commenced since the initiation of arbitration procedures. In cases such as this, the limits on retroactivity are inapplicable; the awarded increases may be retroactive to the commencement of the immediately preceding fiscal year. This bill will provide that increases in rates for compensation, as well as benefit increases, may be awarded retroactively to the commencement of any fiscal year. Thus, the bill would update Act 312 to be in tune with current labor relation's procedures.
>
> 8. What are the arguments against the Bill?
>
> The bill may impose an economic hardship on public employers due to the retroactivity provision.

Significantly, the analysis addressed the economic hardship that could result from allowing the "increases in benefits" to be retroactive to the commencement of any fiscal year and indicated that the bill would update Act 312 to be in tune with current labor relations procedures.

In this regard, Section 10 referred to increases in compensation being able to be awarded retroactively, but did not specifically indicate whether "rates of compensation" referred narrowly to wages or broadly to all economic benefits. Use of an expanded definition of compensation that includes economic benefits was consistent with the provisions of Section 9(f) which required the Act 312 panel to examine "The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received." This clarification was aimed at eliminating arguments that changes in economic benefits could not be awarded retroactively as "increases in rates of compensation." *See, e.g., Warren Police Officers Ass'n v City of Warren*, 89 Mich App 400; 280 N.W. 2d 545 (1979)[Pre-amendment language of Section 10 authorized retroactive changes in health and dental insurance after noting that the language had been changed to support its result].

Metropolitan Council No. 23 was issued on October 17, 1978, almost ten months after the January 3, 1978 effective date of the changes to Section 10 made by 1977 PA 303. It would therefore have been impossible for the Court not to be aware that this section had been amended to include benefits, which explains why the Court discussed the failure of the Legislature to address retroactivity of non-economic benefits when the language did not even refer to "benefits" at all.

The only proper interpretation of Section 10 is that it authorizes retroactivity only of economic benefits, since the Legislature would have used the phrase "issues in dispute" rather

than "increases in rates of compensation or other benefits" if it intended retroactivity to extend to non-economic as well as economic issues. It should also be noted that the Legislature has not acted to amend Section 10 to overrule the decision in *Metropolitan Council No.* 23, an indication that it correctly interpreted Section 10's retroactivity provisions.[20] Accordingly, the Act 312 Panel was without authority to award the Association's proposal regarding the retroactivity of arbitration during the contractual hiatus period and if tries to do so on remand would be properly reversed by the courts upon subsequent appeal.

CONCLUSION

The County Co-employers request that this Court accept this case for either complete or summary review, and upon review, reverse the October 14, 2004, published opinion of the Michigan Court of Appeals and affirm the Ottawa County Circuit Court Judgment and Order, affirming that the Panel's determination of the issues in dispute in this matter is conclusive and not subject to judicial reversal.

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[20] The Court of Appeals continues to consider *Metropolitan Council No.* 23 to be good law, since in the unpublished opinion in *Flint Professional Firefighters v City of Flint* (No 244953, June 17, 2004), the Court relied upon *Metropolitan Council No.* 23 to justify a conclusion that MCL 423.240's silence as to the retroactive application of decreases in compensation and benefits evinces an intent on the part of the Legislature to apply decreases in economic benefits only prospectively.